93-751

FILED
OCT 21 1993
OFFICE OF THE CLERK

NO. 93-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

DONALD MURRAY, JR.,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On a Petition for a Writ of Certiorari

to the Wyoming Supreme Court

PETITION FOR WRIT OF CERTIORARI

WILLIAM L. COMBS
Attorney at Law
724 Front St. - Suite 270
P.O. Box 785
Evanston, WY 82931-0785
(307) 789-7003

Attorney of Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I

Did the Wyoming Supreme Court err in holding that the violation of Rule 4(c)(3), Wyoming Rules of Criminal Procedure, was not subject to the exclusionary rule?

II

Are Wyoming's Involuntary Manslaughter and Criminally Negligent Homicide statutes constitutionally defective?

III

Did the use of a nonlawyer student trainee for primary assistance on appeal provide effective assistance of counsel?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES. iii

OPINIONS BELOW. I

JURISDICTIONAL GROUNDS. 2

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS. 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 29

CONCLUSION. 30

ATTACHMENTS:

Mandate. . . . . .App. A

Op. Denying Motion to Suppress . .App. B

Op. Denying Motion to Remand to County Court. . . . . .App. C

Op. Affirming Conviction . . . . .App. D

Op. Denying App. for Reh'g. . . . ..App. E

Constitutional, Statutory and Rules Provisions . . . . . .App. F

Entry of Appearance. . . . . .App. G

TABLE OF AUTHORITIES

CASES

Federal: Pages

Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1974) . . . 22

Bryson v. U.S., 136 U.S.App. D.C. 113, 419 F.2d 195 (1969) 18

Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) 26

Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973) 22

Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) . . . 26

Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1930) 19

Godfrey v. U.S., 123 U.S.App. D.C. 219, 358 F.2d 650 (1966) 19

Lanzetta v. New Jersey, 306 U.S. 457, 59 S.Ct. 618, 83 L.Ed. 888 (1939) 24

Mallory v. U.S., 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957) . . . 19

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 5,6,7,9,19

Novarro v. U.S., 400 F.2d 315 (5th Cir. 1968) 19

Pension v. Ohio, 488 U.S. 75,
109 S.Ct. 346, 102 L.Ed.2d 300 (1988) . . . 26

Rawlings v. Kentucky, 448 U.S. 98,
100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) . . . 22

Rea v. U.S., 350 U.S. 214,
76 S.Ct. 292, 100 L.Ed. 233 (1956) 20

Strickland v. Washington, 466, U.S. 688,
104 S.Ct. 2052,
80 L.Ed.2d 674 (1984) 27

United States v. Batchelder, 442 U.S. 114,
99 S.Ct. 2198, 60 L.Ed.2d 755 (1979) . 24,25

United States v. Burke, 517 F.2d 377
(2d Cir. 1975) 21

United States v. Cronic, 466 U.S. 648,
104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) . 26,27

United States v. Hall, 505 F.2d 961
(3d Cir. 1974) 21

United States v. Lefkowitz, 285 U.S. 452,
52 S.Ct. 420, 76 L.Ed. 877 (1931) 19

United States v. Searp, 586 F.2d 1117
(6th Cir. 1978) 18,22

United States v. Shelton, 742 F.Supp. 1491
(D.Wyo. 1990) 21

United States v.
$64,000.00 in United States Currency,
722 F.2d 239 (5th Cir. 1984) 18

United States v. Smith, 468 F.2d 381
(3rd Cir. 1972) 18

United States v. Turcotte, 558 F.2d 893
(8th Cir. 1977) 18

United States v. Weaver, 384 F.2d 879
(4th Cir.),
cert den., 390 U.S. 983, 88 S.Ct. 1106,
19 L.Ed.2d 1282 (1967) 19

State:

Cutbirth v. State, 751 P.2d 1257
(Wyo. 1988) 12

People v. Calvaresi, 534 P.2d 316
(Colo. 1975) 25,26

Roberts v. State, 711 P.2d 1131
(Wyo. 1985) 22

OPINIONS BELOW

The Wyoming Supreme Court affirmed the District Court's decision not to suppress Petitioner's custodial statements. The District Court found that the purposeful violation of Rule 4(c)(3), W.R.Cr.P., did not amount to a constitutional violation. The Wyoming Supreme Court found no deliberate, bad faith violation, agreed that the violation did not implicate constitutional protections, and AFFIRMED the District Court's denial of Petitioner's Motion to Suppress. The Wyoming Supreme Court also tacitly affirmed the District Court's rejection of Petitioner's challenge to the constitutionality of Wyoming's Involuntary Manslaughter and Criminally Negligent Homicide statutes.

A reproduction of the Mandate issued by the Wyoming Supreme Court is attached as Appendix A. A reproduction of the decision of the District Court denying Petitioner's Motions to suppress is attached as Appendix B,

and the District Court's opinion rejecting Petitioner's challenge of the aforementioned statutes is attached as Appendix C. A reproduction of the Wyoming Supreme Court Opinion affirming Petitioner's conviction, found at 855 P.2d 350, is attached as Appendix D. The Wyoming Supreme Court denied an Application for Rehearing on July 20, 1993. A reproduction of this decision is attached as Appendix E.

JURISDICTIONAL GROUNDS

Judgment was entered by the Wyoming Supreme Court on June 23, 1993, with Denial of Petitioner's Application for Rehearing entered on July 20, 1993. This Court has jurisdiction to review the judgment of the Wyoming Supreme Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS

(See Appendix F for the verbatim text of the following):

FEDERAL PROVISIONS:

1. Fourth Amendment to the Constitution of the United States.

2. Fifth Amendment to the Constitution of the United States.

3. Sixth Amendment to the Constitution of the United States.

4. Fourteenth Amendment to the U.S. Constitution.

5. Rule 4(d)(3), F.R.Cr.P.

STATE PROVISIONS:

6. Wyo. Stat. §§ 6-2-105; 6-1-104(a)(iii) and (ix); 6-2-107; 6-10-102 (1988).

7. Rule 4(c)(3), W.R.Cr.P.

8. Rule 9(c)(3), W.R.Cr.P.

9. Rule 5(h), Rules of the Supreme Court of Wyoming.

STATEMENT OF THE CASE

On October 1, 1991, at approximately four o'clock (4:00) a.m. (R.Vol.VIII at 880; Transcript of 12/16/91 Motions Hearing at 107, line 25, and at 108, lines 1-9)(hereinafter "Tr.Dec.Mo.Hrg. at ___"), a warrant for the arrest of Petitioner was obtained. The County Attorney for Uinta County, Wyoming, accompanied by Investigator Rex Gaylord of the Uinta County Sheriff's Office, prepared and

obtained the warrant. R.Vol.VIII 880; Tr. Dec.Mo.Hrg. at 105, lines 14-22; at 108, lines 2-9. The warrant charged second degree homicide. R.Vol.VIII at 880; Tr. Dec. Mo. Hrg. at 107, lines 18-23.

Probable cause for the warrant was based on information supplied by a Ms. Carrie Byrne. Ms. Byrne advised Gaylord that, on the previous night, Petitioner fired shots from a handgun at her cousin, Mr. John Bowman Erickson; that one of those shots struck Mr. Erickson in the leg. R.Vol.I at 22-23; 10/1/91 Aff. of Rex Gaylord. Mr. Kevin Smith, Investigator for the Uinta County Attorney's Office, participated in this interview. R.Vol.IX at 885, Motions for New Trial, etc. Exhibits, Defendant's F. Prior to this interview, Gaylord and Smith had learned that Mr. Erickson died as a result of a wound to the leg. R.Vol.I at 22-23; Aff. of Rex Gaylord.

After the warrant was obtained, a number of law enforcement officers went to Petitioner's rural residence to arrest him. Smith was at the scene with the arrest warrant. R.Vol.VIII at 880, Tr.Dec.Mo.Hrg. at 147-149. One of the arresting officers was a Steve Johnson of the Evanston, Wyoming Police Department. R.Vol.VIII at 880; Tr.Dec.Mo. Hrg. at 17-33. Officer Johnson handcuffed Petitioner at approximately seven-thirty (7:30) a.m. when Petitioner came out of his residence. R.Vol.VIII at 880; Tr.Dec.Mo.Hrg. at 19, lines 18-19. Gaylord was present during this handcuffing. R.Vol.VIII at 877, Transcript of Preliminary Examination at 176, lines 10-16. Petitioner repeatedly requested information regarding his arrest, to no avail. R.Vol.VIII at 880; Tr.Dec.Mo.Hrg. at 26-30. No warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), accompanied the arrest. R.Vol.VIII at 880; Tr.Dec.Mo.Hrg. at 30, lines 19-21. Petitioner testified at trial that,

while being handcuffed, one of the officers asked him where the weapon was that he had used to shoot Mr. Erickson. R.Vol.XI at 890; Tr. of Jury Trial Vol.IV at 1158, lines 1-19.

James Kadrmas, Deputy County Sheriff, transported Petitioner to jail. He was specifically instructed to neither advise Petitioner under Miranda, supra, nor to speak with him. R.Vol.VIII at 880; Tr.Dec.Mo.Hrg. at 36, lines 10-17. He was also instructed to place a tape recorder in the transporting vehicle. R.Vol.VIII at 880; Tr. Dec.Mo.Hrg. at 51, lines 15-25. During the thirty (30) minute transportation, Petitioner continued asking for information about his arrest, without response. R.Vol.VIII at 880, Tr.Dec.Mo.Hrg. at 37, lines 22-23; at 52, lines 24-25; at 53, lines 6-8; at 881, Exhibits Received During Motions Hearing (hereinafter "Motions Exhibits"), State's Ex. No. 2 at 1. As instructed, Deputy Kadrmas neither questioned nor advised Petitioner

during this transport. R.Vol. VIII at 880, Tr.Dec.Mo.Hrg. at 54, lines 14-23; at 881, Motions Exhibits, State's Ex. No. 2.

At the jail, Petitioner continued requesting information about his arrest, without response. Id.; R.Vol.VIII at 881, Motions Exhibits, Defendant's Ex. No. CA. He was booked into the jail by Detention Officer Kyle Lamb; the book-in process began at approximately 8:15 a.m. R.Vol.VIII at 880; Tr.Dec.Mo.Hrg. at 60, lines 16-20. During this process, Petitioner continued his unsuccessful requests for information about the arrest. R.Vol.VIII at 880, Tr. Dec.Mo.Hrg. at 61, lines 18-25, at 62, lines 1-21; at 881, Motions Exhibits, Defendant's Exhibit No. CA. During the twenty (20) minute book-in process (R.Vol.VIII at 880; Tr.Dec.Mo.Hrg. at 81, lines 12-14), Petitioner was neither advised under Miranda, informed of the charge, nor given a copy of the warrant. R.Vol.VIII at 880; Tr. Dec.Mo.Hrg. at 70-79.

Indeed, Officer Lamb was instructed not to advise Petitioner of the charge. R.Vol.VIII at 880; Tr.Dec.Mo.Hrg. at 78, lines 21-25; at 79, lines 1-5. Investigator Smith was present at the book-in (R.Vol.VIII at 880, Tr.Dec.Mo.Hrg. at 67, lines 5-25; at 77-78), as was Investigator Gaylord (R.Vol.VIII at 880; Tr.Dec.Mo.Hrg. at 63, lines 3-23). The arrest warrant also available. Id.

Some ten (10) minutes after the book-in, Gaylord took Petitioner to a separate room for interrogation. R.Vol.VIII at 880; Tr.Dec.Mo. Hrg. at 109-111; at 111, lines 19-25. During that interval, Petitioner again unsuccessfully asked to be informed of the charge. R.Vol.VIII at 880; Tr.Dec.Mo.Hrg. at 110, lines 1-10.

Smith and Gaylord then interrogated Petitioner for approximately ninety (90) minutes. R.Vol.VIII at 880; Tr.Dec.Mo.Hrg. at 120, lines 1-4. They did not provide Petitioner with a copy of the arrest warrant

during the entire interrogation. R.Vol.VIII at 880; Tr.Dec.Mo.Hrg. at 120, lines 5-14. Although Petitioner was advised pursuant to Miranda at the inception of this interrogation, he was not apprised of the charge. Id.

Petitioner waived his rights under Miranda and gave statements. R.Vol.VIII at 880, Tr.Dec.Mo.Hrg. at 119-125; at 881, Motions Exhibits, State's Ex. No. 1. Petitioner stated that he had placed approximately four rounds into the dirt after seeing a vehicle's headlights intruding up his driveway; that he fired these shots without suspecting that anyone was out of the vehicle. R.Vol.VIII at 881, Motions Exhibits, State's Ex. No. 1 at 2-6. That, upon firing the last shot in the dirt, he first became aware that Mr. Erickson was out of the vehicle. Id. Petitioner surmised from his arrest that some dirt or shrapnel had struck Mr. Erickson in the ankle, causing a non-fatal injury. Id.

He was clearly unaware that the shot in the dirt posed a risk of death to Mr. Erickson, and Investigator Smith played on this unawareness:

Murray: And I's just, I was just took, you know for granted that it must of got him in the ankle. You know. It was a hollow point. Now, you tell me where did he get shot?

Smith: Through the thigh.

Murray: Straight, straight in?

Smith: At an angle.

Murray: (inaudible) punched?

Smith: Uh-huh.

Murray: No, no ricochet?

Smith: Uh-huh.

Murray: I must a been drunker than I thought.

Smith: Mean, your aim was bad?

Murray: Must a been I didn't, I was shootin' in the dirt. I could a swore I seen the dirt, when he hollered. I could a swore it. I wouldn't shoot Bo he's my friend man.

R.Vol.VIII at 881, Motions Exhibits, State's Ex. No. 1 at 5.

Murray: Did it get a bone?

Smith: Uh, I don't know whether it hit a bone or not.

Murray: He's in the hospital huh?

Smith: Yeah.

R.Vol.VIII at 881, Motions Exhibits, State's Ex. No. 1 at 7.

Once Petitioner had provided all information which Smith felt could be used against him, Smith informed Petitioner of the charge and of the fact that Mr. Erickson had died. R.Vol.VIII at 880, Tr.Dec.Mo.Hrg. at 155, line 5 through p. 159, line 19. Such information was withheld in order to obtain statements from Petitioner. R.Vol.VIII at 880; Tr.Dec.Mo. Hrg. at 139, lines 19-25, through 142, lines 1-6; App. B. Smith testified that, throughout his over ten (10) years of experience, such a technique was common. R.Vol.VIII at 880; Tr.Dec.Mo.Hrg. at 142, lines 1-9. This is not the first case from the Third Judicial District of Wyoming where such an interrogative technique has been

used. See, e.g., Cutbirth v. State, 751 P.2d 1257 (Wyo. 1988).

When a subsequent autopsy revealed that the wound to Mr. Erickson resulted from a ricochet, the charge was reduced to involuntary manslaughter. R.Vol.IX at 884, Tr. Motions for New Trial, etc. at 20, 56.

On February 24, 1992, a jury trial commenced. On November 14, December 11, and December 20, 1991, Petitioner filed various motions to suppress the custodial statements. (Respectively, see, R.Vol.II at 255-6; R.Vol.III at 385, 401-434). Those Motions asserted that the statements should be excluded from the State's case-in-chief. The Motions were grounded on Federal and State Due Process, Self-Incrimination and Assistance of Counsel guarantees. Id. At Hearing of these Motions, Petitioner included Search and Seizure guarantees. R.Vol.VIII at 880; Tr. Dec.Mo.Hrg. at 3, lines 2-7. The District Judge denied the Motions. R.Vol.III at 435-

440; App. B. Although finding that the statements were obtained through a purposeful violation of Rule 4(c)(3), the Judge refused to suppress the statements on grounds that this Rule violation did not implicate Federal or State constitutional guarantees. Id. Petitioner's statements were admitted against him at trial during the State's case-in-chief. R.Vol.XI at 889, Tr. of Jury Trial Vol.III at 839-850; R.Vol.XII at 892, Trial Exhibits Vol.A, State's No. 24.

Also prior to trial, on October 23, 1991, in a Motion to Remand to County Court accompanied by a November 1, 1991, Memorandum in Support, Petitioner challenged the Wyoming Involuntary Manslaughter and Criminally Negligent Homicide statutes. R.Vol.I at 108-134, 176-198. Petitioner contended that the two statutes were so ambiguous and indistinguishable as to violate Federal and State Due Process and Equal Protection guarantees. Id. Following a November 26,

1991, Hearing (R.Vol.VIII at 879), the District Judge rejected this challenge (R.Vol.III at 391-396; App. C). The jury received instructions on both Involuntary Manslaughter and Criminally Negligent Homicide (R.Vol.VI at 783-790); Petitioner was convicted under the former, and was sentenced to serve eight to fifteen years in the Wyoming State Penitentiary.

Petitioner's appointed trial counsel was replaced by the headquarter Office of the Wyoming Public Defender for the appellate process. Petitioner's appeal was then assigned to a nonlawyer student intern. The intern prepared the appellate brief, which was then endorsed by appellate counsel for the Public Defender's Office. Wyoming Supreme Court certified record (hereinafter "Wyo.S.Ct.R."), Brief of Appellant.

Petitioner's conviction was affirmed. App. D. Following this affirmance, Petitioner timely filed his Application for Rehearing

[Wyo.S.Ct.R., Application for Rehearing (hereinafter "Reh.App.")], and Brief in Support of Application for Rehearing (hereinafter "Reh.Brief"). In this Application and supporting brief, Petitioner pointed out that the appellate brief portrayed the events in a manner contrary to Petitioner's statements and testimony. Petitioner also alluded to a number of issues, preserved for appeal, which were not addressed in the appellate brief. Some of the issues raised and ruled on in the District Court, but left unaddressed in the appellate brief, were:

1.) The legitimacy of a Criminal Complaint endorsed and filed by a nonlawyer policeman. R.Vol.I at 14-17, 19-23, 33-37; R.Vol.VIII at 878, Arraignment and Motion Transcript of Proceedings at 2-8, 10-15, 17-20, 21-31; at 877, Tr. of Preliminary Examination at 3-10.

2.) Rejected jury instructions offered by the defense. R.Vol.XI at 890-891, Transcript of Jury Trial, Vols.IV and V at 1197-1209; R. Loose Documents in Manila Folder marked "Proposed Jury Instructions" (hereinafter "Proposed Instructions"), Defendant's No. 3; Proposed Instructions, Defendant's No. 4; Proposed Instructions, Defendant's No. 17; Proposed Instructions, Defendant's No. 22; Proposed Instructions, Defendant's No. 23.

3.) Post-trial Motions for Judgment of Acquittal (R.Vol.VI at 807; R.Vol.IX at 884, Transcript of Motions for New Trial, etc. at 4-13), New Trial (R.Vol.VI at 808; R.Vol.IX at 884, Tr. of Motions for New Trial, etc. at 13-26), and in Arrest of Judgment (R.Vol.VI at 809; R.Vol.IX at 884, Tr. of Motions for New Trial, etc. at 26-39), with resulting denial of all

Motions (R.Vol.IX at 884, Tr. of Motions for New Trial, etc. at 42-50; 54-149).

Based on the foregoing, Petitioner contended that he had been deprived of effective assistance of appellate counsel. Wyo.S.Ct. R., Reh.App., Reh.Brief. On July 20, 1993, The Wyoming Supreme Court summarily denied the Application for Rehearing. Appendix E.

A: <u>WARRANT REQUIREMENTS: CONFLICT AMONG FEDERAL COURTS</u>

Rule 4(c)(3) of the Wyoming Rules of Criminal Procedure is identical to Rule 4(d)(3) of the Federal Rules of Criminal Procedure. Both mandate that, "upon request [the officer executing the warrant] shall show the warrant to the defendant as soon as possible." Moreover, should the officer not have the warrant in his possession "at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been

issued." An officer is not required to possess a copy of the arrest warrant in order to effectuate a lawful arrest [U.S. v. Turcotte, 558 F.2d 893 (8th Cir. 1977)], and a copy of the warrant need not be shown absent a request for such by a defendant [United States v. $64,000.00 in United States Currency, 722 F.2d 239 (5th Cir. 1984)]. It has also been held that an officer need not inform a defendant of the verbatim language of the charge. See, e.g., U.S. v. Smith, 468 F.2d 381 (3rd Cir. 1972). A body search for suspected weapons has also been held permissible prior to providing a defendant the required warrant information. Bryson v. U.S., 136 U.S.App.D.C. 113, 419 F.2d 195 (1969). In other words, various circumstances surrounding a warrant disclosure Rule violation have been held to be excusable and therefore not subject to the exclusionary rule. Cf, United States v. Searp, 586 F.2d 1117 (6th Cir. 1978)(violation of nighttime

search provision in Rule 41(c), F.R.Cr.P., held excusable).

Nonetheless, this Court has recognized that the very manner of an arrest and interrogation may be so abrasive as to trigger the exclusionary rule under Fourth and Fifth Amendment guarantees. See, e.g., Miranda, supra (coercive arrest techniques); United States v. Lefkowitz, 285 U.S. 452 (1931) (arrest warrant execution for purpose of gathering evidence of crime); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1930)(same); Mallory v. U.S., 354 U.S. 449 (1957) (violation of Rule 5(a), F.R.Cr.P. arraignment requirement). Federal circuit courts have expressed similar recognition. See, e.g., United States v. Weaver, 384 F.2d 879 (4th Cir.), cert den., 390 U.S. 983 (1967) (delay in arrest warrant execution for purpose of gaining entry into locale desired to be searched); Godfrey v. U.S., 123 U.S.App.D.C. 219, 358 F.2d 650 (1966)(same); Novarro v.

U.S., 400 F.2d 315 (5th Cir. 1968) (violation of Rule 41(a), F.R.Cr.P.). In such cases, the exclusionary rule has been applied. The Rules of Criminal Procedure provide practical guidance to law enforcement regarding the protections accorded our citizens. See, Rea v. U.S., 350 U.S. 214 (1956). They were "drawn for innocent and guilty alike." Id.

Rather than a simple "ministerial" rule which does not implicate substantial rights, Rule 4(c)(3) W.R.Cr.P., and 4(d)(3), F.R.Cr.P. appear to ensure that an arrestee understands the nature of the charges, and is therefore able to knowingly and intelligently make decisions regarding rights to silence and counsel. The fact that this warrant disclosure requirement is repeated in Rule 9(c)(3), W.R.Cr.P., serves to emphasize the perceived importance of the requirement. Appendix F. Certainly, the Sixth Amendment guarantee "to be informed of the nature and cause of the accusation" is implicated.

The Wyoming Supreme Court, under the premise that Rule 4(c)(3) is merely "ministerial," analyzed the suppression issue by analogy to the search warrant cases of United States v. Burke, 517 F.2d 377 (2d Cir. 1975), and United States v. Shelton, 742 F.Supp. 1491 (D.Wyo. 1990). Those cases analyze a Rule 41 search warrant violation under two factors in assessing the applicability of the exclusionary rule:

> 1.) [whether] there was "prejudice" in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or 2.) [whether] there is evidence of intentional and deliberate disregard of a provision in the Rule."

United States v. Burke, 517 F.2d 377, 386-387 (2d Cir. 1975).

The Federal Circuits are not uniform in this approach. See, e.g., United States v.

Hall, 505 F.2d 961 (3d Cir. 1974) (employing only a test of "prejudice" in terms of whether the violation offends fundamental fairness or due process concepts).

Although the sanctions for such violations are left largely to court discretion [Cupp v. Naughten, 414 U.S. 141, (1973)], such discretion requires analysis under the various purposes for which each rule was designed. Searp, supra at 1123. The five-factor analysis employed by this Court in Brown v. Illinois, 422 U.S. 590 (1974), as codified in Rawlings v. Kentucky, 448 U.S. 98 (1980), provides the most pertinent framework in this case. Basing its discretion on conflicting search warrant cases was inappropriate for the Wyoming Supreme Court in this case, particularly in view of its prior pronouncements regarding arrest warrant requirements. Roberts v. State, 711 P.2d 1131 (Wyo. 1985) (Rule 4(c)(3), W.R.Cr.P. violation).

B: STATUTORY AMBIGUITIES: CONFLICT AMONG STATE HIGH COURTS

The Wyoming involuntary manslaughter statute proscribes the unlawful killing of a "human being, without malice, expressed or implied,... [i]nvoluntarily, but recklessly.... " W.S. § 6-2-107(a) (1988). The criminally negligent homicide statute provides, "a person is guilty of criminally negligent homicide if he causes the death of another person by conduct amounting to criminal negligence. " W.S. § 6-2-106(a) (1988). The statutory definitions of "criminal negligence" and "recklessly" are as follows:

> A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

W.S. § 6-1-104(a)(iii) (1988).

> A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

W.S. § 6-1-104(a)(ix) (1988).

The Criminally Negligent Homicide statute carries a maximum penalty of incarceration for one (1) year and/or a two thousand dollar ($2,000.00) fine. W.S. § 6-2-107(b) (1988). The Involuntary Manslaughter statute carries a maximum penalty of incarceration for twenty (20) years and/or a ten thousand dollar ($10,000.00) fine. W.S. §§ 6-2-105(b) and 6-10-102 (1988).

The Fifth Amendment to the U.S. Constitution requires reasonable notice and a reasonable degree of certainty as to what a law commands or forbids. Lanzetta v. New Jersey, 306 U.S. 457 (1939); United States v. Batchelder, 442 U.S. 114 (1979). Due Process

is satisfied only if "overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized." Batchelder at 442 U.S. 122-4 (emphasis added).

The Colorado Supreme Court found Colorado's similarly-worded Involuntary Manslaughter and Criminally Negligent Homicide statutes so indistinguishable as to be unconstitutional. People v. Calvaresi, 534 P.2d 316 (Colo. 1975)(en banc). The Court therefore exercised the doctrine of lenity (Batchelder at 442 U.S. 121-122) and struck the Colorado Involuntary Manslaughter statute. Just as the Wyoming statutes, Colorado's provisions purported to distinguish between "conscious disregard" and "failure to perceive." However, both of Colorado's provisions defined the nature and degree of the disregarded or unperceived risk as a "deviation from the standard of care that a reasonable person would observe in the situation." The duplication of this language

in both statutes, held the Colorado Court, rendered any distinction to be

> without a sufficient pragmatic difference. To base a conviction of a felony, rather than a misdemeanor, upon the shifting sands of these semantics does not constitute substantial justice.

Calvaresi at 318-319.

The vagaries of such "shifting sands" (Id.) allows for arbitrary and discriminatory enforcement [see, e.g., Colautti v. Franklin, 439 U.S. 379 (1979)], without so much as a scienter requirement to provide a meaningful distinction. Colautti at 439 U.S. 394-395.

C: **NONLAWYER REPRESENTATION**

The Sixth Amendment guarantee of the right to effective assistance of counsel, [see, United States v. Cronic, 466 U.S. 648 (1984), applies at both the trial and appellate stages. Evitts v. Lucey, 469 U.S. 387 (1985). This Court noted as follows in Pension v. Ohio, 488 U.S. 75, 85 (1988):

> The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the

> trial to appellate stages. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not foregone and that substantial legal and factual arguments are not inadvertently passed over.

When the surrounding circumstances clearly point to a deprivation of this right, the standard analysis for ineffective assistance claims [Strickland v. Washington, 466 U.S. 688 (1984)] is unnecessary; ineffectiveness is presumed. Cronic, supra.

In this case, the assignment of a nonlawyer student intern to provide primary assistance for briefing an indigent criminal appeal justifies a presumption of ineffectiveness. The Brief of Appellant was submitted on August 14, 1992. Id. In Wyoming, the State examination for admission to the Bar is conducted in July. Appendix F, Rule 5(h), Rules of the Supreme Court of Wyoming. Preparation for the Bar exam can too easily take priority over drafting an appellate brief. Although not yet admitted to

the Bar, the student intern's name appears as one of the "Attorneys for Appellant." Wyo. S.Ct.R., Brief of Appellant; App. D. This process raises serious questions regarding the primary responsibility for reviewing the record, determining the issues to be raised, and composing the Brief. Such a system does an injustice to the fundamental Sixth Amendment right to be represented by counsel.

Apart from the foregoing, the contents of the appellate brief evidence errors so serious as to undermine confidence in the appellate outcome.

The Brief presents a scenario totally at odds with the consistent relation of events supplied by Petitioner. Cf, Wyo. Sup.Ct.R., Brief of Appellant at 5, with R.Vol.XII at 892, State's Trial Exhibit No. 24, with R.Vol.XI at 890, Tr. of Jury Trial Vol. IV at 1107-1109, 1123-1155, 1177. Nonetheless, the Brief author states that the version set forth therein was "not contradicted." Wyo.S.Ct.R.,

Brief of Appellant at 5. The contradictions between the Brief version and Petitioner's actual statements concern the crucial issue of subjective awareness of risk. Although Petitioner's unawareness of either the risk or the result is obvious throughout the record, the Brief of Appellant ignores that unawareness. As a result, Petitioner's related grounds for appeal were effectively eliminated.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve important issues relative to the interplay of arrest warrant disclosure requirements and constitutional guarantees. A uniform standard for analyzing application of the exclusionary rule to search/arrest warrant rule requirements needs to be settled by this Court.

Certiorari should also be granted to resolve a conflict between the Wyoming and Colorado Supreme Courts concerning the

constitutional validity of their similar Involuntary Manslaughter and Criminally Negligent Homicide statutes. Colorado found its statutes constitutionally impermissible, while Wyoming has permitted its own to survive. Certiorari should be granted to resolve this fundamental conflict.

Finally, Certiorari should be granted to determine whether the use of nonlawyer student interns to formulate appellate briefs comports with the guarantee of effective assistance of counsel.

CONCLUSION

Based on the importance of the unsettled constitutional interests outlined herein, it is urged that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

WILLIAM L. COMBS
724 Front Street, Suite 270
P.O. Box 785
Evanston, WY 82931-0785
(307) 789-7003

ATTORNEY FOR PETITIONER

APPENDIX

APPENDIX A.

MANDATE

IN THE SUPREME COURT, STATE OF WYOMING

APRIL TERM, A.D. 1993

RE: DONALD MURRAY v. THE STATE OF WYOMING
Case No. 92-109 (Your Cr. 8-165)

MANDATE AFFIRMING JUDGMENT AS MODIFIED

The referenced cause was taken under advisement and the opinion of this Court was delivered on June 23, 1993, affirming the judgment of the district court as modified. Therefore, in accordance with WYO.R.APP.P 9, it is,

ORDERED that the judgment of the Third Judicial District Court, Uinta County, Wyoming, be and hereby is, affirmed as modified. The decision of this Court shall be carried into execution and given fill effect without delay.

DATED this 21st day of July, 1993.

FOR THE COURT:

Jerrill D. Carter, Clerk

APPENDIX B.

OPINION DENYING MOTION TO SUPPRESS

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR THE COUNTY OF UINTA, STATE OF WYOMING

THE STATE OF WYOMING, PLAINTIFF, v. DONALD MURRAY, DEFENDANT,	)	CRIMINAL NO. 8-105 File Stamped December 23, 1991

MEMORANDUM DENYING MOTION TO SUPPRESS

After his arrest, Defendant, Donald Murray, began talking to police officers. Some of the statements which the Defendant made to police officers were spontaneously volunteered. Other statements were made in response to police interrogation. Defendant seeks to have each and every statement suppressed. Defendant's Motion to Suppress will be denied.

Defendant was arrested near Fort Bridger, Wyoming. At the time of his arrest, there were 11 officers present. Only 5 of the officers involved with the arrest testified at

the suppression hearing.

The officer who made the actual arrest and the officer who transported the Defendant to the county jail both testified that they did not advise the Defendant of the exact charges for which he was arrested. They explained that although they knew a warrant for the arrest of the Defendant had been issued, they did not know the exact charges. Neither of these officers attempted to question Defendant; and they did not attempt to engage him in conversation. However, the Defendant spontaneously and voluntarily talked to these officers, even when they remained silent.

At the jail, after booking, the Defendant was taken to an interrogation room for questioning by Officers Smith and Gaylord. Before the officers could advise the Defendant of his Fifth Amendment rights as articulated in Miranda vs. Arizona, the Defendant made further spontaneous statements. After being given the Miranda warnings, the Defendant

demonstrated not only a desire to waive his rights, as well as a desire to talk to the officers, but an eagerness to talk with them.

It is interesting to note that even though the Defendant had inquired without success on several occasions about the charges, when the officers read the Defendant his rights, he made no inquiry concerning the charges. Instead he again began to tell the officers his side of the story. The record reflects:

> SMITH: You know, before we really get into any questioning and stuff I need to advise you of your rights. Okay? You have the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand these, each of these, rights that I've explained to you?
>
> MURRAY: Yeah.
>
> SMITH: Having these rights in mind do you wish to talk to us now? Where do you need to begin to let us

know what happened?

MURRAY: First of all, Bo gettin' shot was an accident.

There is no doubt whatsoever that the Defendant waived his rights of his own deliberate choice, free from intimidation or coercion. However, the Defendant contends he did not comprehend the consequences of his decision to abandon his rights to remain silent because, in violation of Rule 4, Wyoming Rules of Criminal Procedure, the officers refused to tell him that he had been charged with second degree murder. Defendant also contends that the refusal to tell him about the charges was a deliberate deception on the part of the officers which rendered his waiver of the right to remain silent a product of the deception rather than a product of his own deliberate choice.

DECEPTION

The Court finds and concludes from the totality of the circumstances that even if the officers deliberately sought to deceive the Defendant, his waiver of his rights to remain

silent was not a product of this deception. The evidence is clear. The Defendant knew that he was in some sort of trouble because of an altercation with the decedent; and he was determined to tell his side of it. The deception, if any, did not produce the waiver. Instead, it was the Defendant's need to tell the officers that "Bo gettin' shot was an accident" which produced the waiver.

Defendant contends that because he did not know the crime with which he was charged, he could not knowingly waive his rights. Without knowing the charges, Defendant contends he could not know the consequences of his waiver.

The rights which the Defendant waived were the right to have any attorney present and the right to remain silent. The consequences of the waiver was [sic] interrogation without the benefit of legal counsel and the risk that "anything you say can and will be used against you <u>in a court of law</u>". Obviously, the consequences were not

the limited possibility that anything you say can and will be used against you in a court of law on charges of second degree murder.

The testimony and evidence reflect that Defendant understood that he was surrendering his rights with respect to all possible charges and that he was eager to talk with the officers.

RULE 4

Rule 4 of the Wyoming Rules of Criminal Procedure provides in pertinent part:

> The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the Defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the Defendant of the offense charged and of the fact that a warrant has been issued. . . .

Law enforcement personnel did not comply strictly with this rule. They purposely withheld the exact charges from the Defendant until after they obtained a statement from

him. Defendant believes that the officers' violation of Rule 4 should be punished and disciplined by excluding the use of Defendant's statements as evidence in this case.

The Court recognizes the rule is utilized to remedy violations of both 4th and 5th amendment rights. The Court recognizes that cases such as Wong Sun v. U.S. and Brown v. Illinois excluded statements gathered as a consequence of illegal arrests. The Court notes the ill-advised, vague and uncertain dicta contained in Roberts v. State 711 P.2d 1131, 1136 (Wyo. 1985):

> If the warrant is not available to support the arrest, then the officer should at least give the reasons orally; and if he fails to do so, the arrest should be invalid for at least some purposes.

However, the Court also recognizes that the violation, if any, in this case is not a violation of either the 4th Amendment of the United States Constitution or Article I, Section 4 of the Wyoming Constitution. The arrest in this case was made pursuant to a

warrant issued by a magistrate upon probable cause supported by oath, affirmation and affidavit. The sufficiency of the underlying complaint and warrant has not been attacked. The arrest in this case, as a matter of law, as well as a matter of fact, was not invalid.

Instead, the violation, if any, in this case was the violation of a rule of criminal procedure, which has for its obvious object and purpose the goal of lessening resistance to arrest and confrontations between police and citizens.

The Court has not been able to find any cases which remedy violations of the procedures required by Rule 4 by means of the exclusionary rule. None have been supplied by the Defendant. The Court does not believe the exclusionary rule should be employed in this case as a means of enforcing compliance with Rule 4. There are more appropriate remedies.

More importantly, the United States Supreme Court has recognized that even when someone has been arrested illegally, the

arrested person may decide to confess as an act of free will unaffected by the initial illegality. See Brown v. Illinois, 422 U.S. 590, 603, 84 L.Ed.2d 416, 427 (1975). Not only was the arrest valid in this case, but more importantly, the statements of the Defendant were the product of his free will unaffected by the alleged illegality.

The Motion to Suppress will be denied.

DATED this 23rd day of December, 1991.

Signed by John D. Troughton, District Court Judge.

APPENDIX C.

OPINION DENYING MOTION TO REMAND TO COUNTY COURT

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR THE COUNTY OF UINTA, STATE OF WYOMING

THE STATE OF WYOMING, PLAINTIFF, v. DONALD MURRAY, DEFENDANT,	)	CRIMINAL NO. 8-105 File Stamped December 18, 1991

MEMORANDUM DENYING MOTION TO REMAND

Defendant has been charged with involuntary manslaughter in violation of W.S. 6-2-105(a)(ii). Defendant seeks remand (but not dismissal) of his case to County Court. He contends that, if he is to face criminal charges for the accidental killing of another human being, the only criminal charges which can be filed are alleged violations of W.S. 6-2-107, criminally negligent homicide.

Defendant offers three arguments in support of his contentions:

> 1. When the criminally negligent homicide statute was adopted in 1985, this new enactment impliedly repealed the involuntary manslaughter statute, leaving the

criminally negligent homicide statute as the only statute under which Defendant can be charged.

2. Defendant cannot be prosecuted under the involuntary manslaughter statute because this statute (but presumably not the criminally negligent homicide statute) is so vague, ambiguous and uncertain that it denies to Plaintiff his constitutional rights of due process. Because the manslaughter statute is unconstitutional, the criminally negligent homicide statute is the only statute under which Defendant can be charged.

3. Because the involuntary manslaughter statute and the criminally negligent homicide statute provide different penalties for the same criminal misconduct, the involuntary manslaughter statute (but presumably not the criminally negligent homicide statute) denies to Defendant his right to equal protection under the Wyoming Constitution. Defendant seems to concede that neither statute denies him equal protection under the United States Constitution.

Although the Defendant moves for a remand of this case to the County Court, the Court will treat the motion as a Motion to Dismiss. Both the Motion to Remand, as well as the Motion to Dismiss, will be denied.

REPEAL BY IMPLICATION

Before the rule of repeal by implication

can come into play, there must be two statutes which address the same subject. Defendant claims the involuntary manslaughter statute and the criminally negligent homicide statute made the same conduct criminal. The contention is simply not true. The statutes each make different conduct criminal.

The involuntary manslaughter statute provides in pertinent part:

> A person is guilty of manslaughter if he unlawfully kills any human being without malice, express or implied, either:
>
> . . . .
>
> ii. Involuntarily, but recklessly except under circumstances constituting a violation of W.S. 6-2-106(b). W.S. 6-2-105

The criminally negligent homicide statute provides in pertinent part:

> Except under circumstances constituting a violation of W.S. 6-2-106, a person is guilty of criminally negligent homicide if he causes the death of another person by conduct amounting to criminal negligence. W.S. 6-2-107
>
> Recklessly is defined as follows:
>
> A person acts recklessly when he

> consciously disregards a substantial and unjustifiable risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. W.S. 6-1-104(a)(ix).

Criminal negligence is defined as follows:

> A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

To be sure, both statutes are homicide statutes.

Furthermore, both statutes proscribe the involuntary or unintentional killing of another human being.

Both statutes recognize that the killing occurs from "a substantial and justifiable [sic] risk that (death) . . . will occur, and (death) results."

But, the statutes are clearly different. Each contains an element which the other does not. One statute applies to killings which occur when someone consciously disregards the substantial and justifiable [sic] risk of death. The other applies to killings which occur when someone carelessly fails to perceive the substantial and justifiable [sic] risk of death.

Because the statutes obviously address different conduct, there is no conflict or repugnancy between the statutes. Consequently, there can be no repeal by implication.

DUE PROCESS

Defendant claims the language of the involuntary manslaughter statute is vague, ambiguous and subject to speculation. In short, Defendant believes the statute fails to give people of ordinary intelligence fair notice of what conduct is forbidden.

The Court disagrees. Although the statute could be written better, it warns

everyone that if you kill another human being as a consequence of your conscious disregard of a substantial and unjustifiable risk of death, you will be guilty of manslaughter. A person of ordinary intelligence can weigh his contemplated conduct against the prohibition of this statute and know whether or not his contemplated conduct is proscribed by it. Britt v. State, 752 P.2d 426, Sorensen v. State, 604 P.2d 1031.

EQUAL PROTECTIONS

Because the involuntary manslaughter statute and the criminally negligent homicide statute each make different conduct penal, there would be no denial of equal protection of the law. This would be true because there would be no possibility for different treatment being afforded different individuals.

However, in apparent recognition of this fatality, the Defendant assets: "The lack of clear definition in the statutes at issue in this case form the basis for defendant's

challenge." As near as the Court can determine, Defendant appears to be saying that there are internal "ambiguities" in each of the statutes which have been mentioned, as well as "ambiguities" between the statutes which appear upon comparison. The thrust of the argument appears to be that consideration of the two statutes, either together or apart, creates an ambiguity which should be resolved in favor of lenity. When this same argument was previously made to the Wyoming Supreme Court, the Court stated:

> The thrust of the argument appears to be that consideration of the two statutes creates an ambiguity which should be resolved in favor of lenity. But, "[l]enity thus serves only as an aid for resolving an ambiguity; it is not to be used to beget one. The rule comes into operation 'at the end of the process of construing what congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.'" Albernaz v. United States, 450 U.S. 333, 342, 101 S.Ct. 1137, 1144, 67 L.Ed.2d 275 (1981). We see no ambiguity either in the proscriptions of the statues or in the punishments provided . . . Stripped of rhetorical gloss appellant's argument distills to his claim that the injury-producing D.W.U.I. statue is specific and must

> be applied in this circumstance to the exclusion of the more general aggravated assault and battery statue. Nowack v. State, 561 P.2d 561, 564 (Wyo. 1989).

Similarly, in this case, the Court sees no ambiguity either in the proscriptions of the statutes or in the punishments which they provide. Stripped of its rhetorical gloss, Defendant's argument distills to a claim that the criminally negligent homicide statute must be applied in this circumstance to the exclusion of the involuntary manslaughter statute because the criminally negligent homicide statute is more lenient. However, the statutes clearly distinguish between two different types of human conduct; and by their enactment, the legislature has expressed its decision that the conscious disregard of a substantial risk of death is conduct more egregious than the failure to perceive a substantial risk of death. The distinction appears to have a rational basis. The statutes do not deny the Defendant equal

protections of the law. [1]

DATED this 18th day of December, 1991.

Signed by John D. Troughton, District Court Judge.

---

[1]. Although it has not been expressly stated, and therefore becomes a matter of conjecture, the Court suspects the real objection to the involuntary manslaughter statute and criminally negligent homicide statute is the belief that these statutes grant too much discretion to prosecutors and to juries. Whether or not the discretion granted is too broad is not a legal issue. Instead it is a political issue.

APPENDIX D.

OPINION AFFIRMING CONVICTION

DONALD MURRAY, Appellant
(Defendant),

v.

The STATE of Wyoming,
Appellee (Plaintiff)

No. 92-109.

Supreme Court of Wyoming.

June 23, 1993.

Rehearing Denied July 20, 1993.

Defendant was convicted in the District Court, Uinta County, John D. Troughton, J., of involuntary manslaughter, and he appealed. The Supreme Court, Macy, C.J., held that: (1) officers' violation of rule of criminal procedure in failing to inform defendant of warrant and reason for his arrest did not render arrest "illegal," and violation did not warrant exclusion of defendant's statements; (2) evidence was sufficient to support conviction; (3) trial court is only required to make specific finding regarding ability to pay before ordering restitution when defendant does not have a presence [sic] or prospective

ability to pay; but (4) defendant could not be ordered to pay $10,000 to crime victim's compensation account without finding that he had ability to pay.

Affirmed as modified.

MACY, Chief Justice.

Appellant Donald Murray appeals from his conviction for involuntary manslaughter in violation of Wyo. Stat.§6-2-105(a)(ii) and (b) (1988).

We affirm as modified.

Appellant presents the following issues for our consideration:

I. Whether wilful[] and wanton conduct by law enforcement agents in purposely failing to inform Mr. Murray of the reasons for his arrest in violation of W.R.Cr.P. 4(c) invalidates the arrest and requires suppression of statements attained during the illegal arrest?

II. Whether the evidence was sufficient to sustain a conviction for involuntary

manslaughter?

III. Whether the trial judge failed to make a determination of defendant's ability to pay prior to ordering restitution and assessing penalties to be paid to the Wyoming victim's compensation fund?

Appellant and the victim worked together on an oil rig located near Granger, Wyoming. The men were good friends who had known each other since 1983. On September 20, 1991, they completed their shift on the oil rig at approximately 6:30 p.m. They began drinking shortly thereafter, and eventually went to the Cowboy Bar in Mountain View. While they were at the Cowboy Bar, the victim and Appellant started arguing about one of their co-workers. Appellant left the bar before the argument could escalate into a physical confrontation. He proceeded by himself to Pete's Bar where he ate pizza and continued drinking. At about 10:30 p.m., Appellant drove home.

At eleven o'clock that same evening, the

victim had his cousin drive him to Appellant's house so that he could retrieve his work clothes which were in the back of Appellant's truck. As the victim's cousin drove down Appellant's driveway, she observed a flash from a gun barrel. While continuing on down the driveway, she saw and heard additional shots being fired and noticed Appellant standing on his porch holding a handgun. The victim exited the vehicle, identified himself, and explained to Appellant that he just wanted to get his work clothes. Appellant yelled, "'[g]et off of my property'" to the victim. He fired three additional shots from his porch, two of which landed near the victim's feet. The victim again identified himself and started walking toward Appellant's truck. Appellant left his porch and walked toward the victim until they were approximately six feet apart. The victim said: "'Just let me get my work clothes and we'll leave.'" Appellant repeated the command to get off his property.

The victim said, "'Okay. I'm leaving,'" turned around, and had started walking back towards the car when Appellant fired three or four additional shots. One of the bullets ricocheted off a rock and passed through the victim's right thigh, severing his femoral artery and femoral vein. The victim also suffered a relatively minor wound to his right buttock. The doctor who performed the autopsy was unable to determine whether the two wounds were the result of a single gunshot or multiple gunshots.

The victim hopped back to the car after being shot. His cousin drove him to Pete's Bar which was located approximately two miles from Appellant's house. The victim's cousin and one of the bartenders placed the victim on the pavement in the bar's parking lot and elevated his leg with a stool. The ambulance arrived about half an hour after the 911 call had been placed. When the ambulance arrived, the victim's vital signs were normal, and his

level of consciousness indicated that he was in "great shape." The emergency medical technicians thought the victim had lost only a minimal amount of blood. In reality, he had lost a massive quantity of blood during the time that it took to drive from Appellant's house to Pete's Bar. The victim lost consciousness shortly before reaching the hospital, his breathing became difficult, and his pupils dilated. The EMT's and the emergency room physicians were unable to resuscitate him.

Appellant was arrested and initially charged with second degree murder. The deputy county and prosecuting attorney subsequently reduced the charge to involuntary manslaughter. A jury found Appellant guilty of involuntary manslaughter and the court sentenced him to serve a term of not less than eight years nor more than fifteen years in the Wyoming State Penitentiary. Appellant filed a timely appeal with this Court.

Rule 4(c)(3) of the Wyoming Rules of Criminal Procedure

[1] Appellant argues that the trial court should have suppressed any statements he made while he was under arrest because the law enforcement officers violated W.R.Cr.P. 4(c)(3) (revised effective March 24, 1992). Before its revision in 1992, that rule provided in pertinent part:

> (c) Execution or service; and return.
>
> . . . .
>
> (3) Manner.--The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued.

The evidence and testimony are consistent with Appellant's claim that the officers did not comply with W.R.Cr.P. 4(c)(3)'s requirements. Early in the morning of October 1, 1991, several officers from different law

enforcement agencies surrounded Appellant's house. When Appellant emerged from his house, Steve Johnson, an Officer with the Evanston police department, handcuffed him and took him into custody. As Officer Johnson was handcuffing him, Appellant asked, "'What the hell's going on?'" and "'It's [the victim], isn't it? Is he hurt bad?'" Officer Johnson told Appellant that he was under arrest and to "shut up." Officer Johnson and the officer who transported Appellant to the jail testified that they did not inform Appellant of the second degree murder charge and they did not advise him that an arrest warrant had been issued. [1] The officers explained that they knew a homicide had occurred and an arrest warrant had been issued for Appellant but they were unaware of the precise charge.

Kyle Lamb, a detention officer with the

---

[1]. It appears from the record that the transporting officer informed Appellant during booking process that a warrant existed.

Uinta County sheriff's department, who booked Appellant into the jail, also failed to inform him of the second degree murder charge and of the existence of an arrest warrant. Appellant asked, among other thing, what the charge was, and Officer Lamb told him that he did not know. The officer testified that he did not learn of the specific charge against Appellant until the end of the booking process when he received a facsimile of the arrest warrant. Rex Gaylord, an investigator with the Uinta County sheriff's office, was also present when the facsimile arrived. According to Officer Lamb, Investigator Gaylord instructed him not to advise Appellant of the charge as he would inform Appellant. Investigator Gaylord testified he never instructed Officer Lamb not to advise Appellant of the charge.

At one point in the booking process, Appellant also asked Investigator Gaylord to inform him of the charge. Investigator Gaylord told him that they would discuss it in

a few minutes. The investigator explained that he did not want to discuss the charge when asked because he wanted to preserve possible evidence of gun shot residue which may have been on Appellant's clothes before talking to him. Approximately ten minutes after Appellant asked what he was charged with, Investigator Gaylord took him to the interview room where they met Kevin Smith, an investigator from the county attorney's office. Investigator Smith immediately advised Appellant of his Miranda rights. Appellant waived those rights and proceeded to offer a detailed description of the prior evening's events. Just over fourteen minutes into his statement, Investigator Smith informed Appellant for the first time that the victim had died and that he was charged with second-degree murder. Investigator Smith's reason for not immediately informing Appellant of the second-degree murder charge was that he wanted to discover Appellant's motive and

intent in shooting the victim.

Prior to trial, Appellant moved to suppress the statements he made to the officers. He based his motion on, among other things, the officers' violation of W.R.Cr.P. 4(c)(3). The trial judge agreed with Appellant that the officers' did not fully comply with the rule. However, he found that suppressing the evidence was not the appropriate remedy because the officers violated a procedural rule rather than Appellant's constitutional rights. On appeal, we will uphold the district court's denial of defendant's motion to suppress unless the denial was clearly erroneous. Roose v. State, 759 P.2d 478, 487 (Wyo. 1988).

Appellant argues that the officers illegally arrested him when they failed to comply with W.R.Cr.P. 4(c)(3) and that all subsequent statements should have been suppressed as being fruits of that illegal arrest. Appellant finds support for his claim

in several United States Supreme Court decisions which hold that a defendant's statements made following an illegal arrest are not admissible unless the prosecution can show "not only that the statements meet the Fifth Amendment voluntariness standard, but also that the casual connection between the statements and the illegal arrest is broken sufficiently to purge the primary taint of the illegal arrest." Dunaway v. New York, 442 U.S. 200, 204, 99 S.Ct. 2248, 2252, 60 L.Ed.2d 824 (1979). See also, Taylor v. Alabama, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982); and Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

The Supreme Court cases upon which Appellant relies concern the admissibility of a defendant's statements following an illegal arrest; i.e., one without probable cause. This underlying premise is noticeably absent from the facts of this case. The trial court accurately described Appellant's arrest as

being one "made pursuant to a warrant issued by a magistrate upon probable cause supported by oath, affirmation and affidavit."

Appellant maintains that our decision in Roberts v. State, 711 P.2d 1131 (Wyo. 1985), supports his theory that the officers' W.R.Cr.P.(c)(3) violation rendered his arrest illegal. Roberts was a resisting arrest case where the defendant argued that he had not been informed of the grounds for arrest and the existence of a warrant in violation of W.R.Cr.P.(c)(3). The jury was instructed: "'[T]he failure to inform the Defendant of the purpose for the arrest does not invalidate the arrest.'" 711 P.2d at 1136 (emphasis omitted). This Court held in a plurality opinion that the instruction was an incorrect statement of the law. In somewhat cryptic language, we explained:

> [W}e do not think that a total failure to inform the arrestee can be overlooked. Rule 4 says that the officer shall inform the defendant of the offense charged if he does not have the warrant available to

> show the defendant. The rule recognizes that people ought to know why they are being arrested. If the warrant is not available to support the arrest, then the officer should at least give the reason orally; and, if he fails to do , the arrest should be invalid for at least some purposes.

Id. (emphasis omitted and added). The opinion does not specify for what "purposes" an arrest should be invalidated. Nor is it clear whether an invalid arrest is the same as an illegal arrest. In any event, the cited language does not provide adequate authority for the proposition that a W.R.Cr.P. 4(c)(3) violation renders an arrest illegal. First, three justices did not join in the quoted portion of the opinion, 800 P.2d 1145. Second, the statement was dictum. Accordingly, we reject Appellant's theory that the officers' W.R.Cr.P. 4(c)(3) violation made his arrest illegal.

[2] Despite the fact that Appellant was not illegally arrested, we must still determine the appropriate remedy, if any, for

a W.R.Cr.P. 4(c)(3) violation. The rule itself does not specify a particular remedy. One method for deterring future violations would be to exclude any evidence which had been obtained in violation of the rule. However, we are not convinced that every violation of the rule warrants exclusion of the evidence. The difficulty in arriving at an appropriate remedy is that the rules, by their nature, "blend constitutional limitations on police activity, procedural limitations designed to avoid constitutional violations, and purely administrative 'house-keeping' regulations." United States v. Searp, 586 F.2d 1117, 1123-24 (6th Cir. 1978), cert. denied, 440 U.S. 921, 99 S.Ct. 1247, 59 L.Ed.2d 474 (1979). The remedies should vary accordingly. When the violation compromises a substantial or constitutional right, the exclusionary rule is an appropriate remedy, especially when the right is related to Fourth Amendment protections. See WAYNE R. LAFAVE &

JEROLD H. ISRAEL, CRIMINAL PROCEDURE §3.1(e) at 146 (1984). But, when the violated rule is merely ministerial or technical, the exclusionary rule becomes a remedy out of proportion to the benefit to be gained. The problem is in ascertaining whether the violation implicates a substantive right or merely a procedure designed to protect that right.

[3] We conclude that in this case the officers' conduct did not implicate a sufficiently substantive right to warrant exclusion of Appellant's statements. We have not located any cases which analyze the exclusionary rule's applicability to evidence obtained in violation of W.R.Cr.P. 4(c)(3). See Bryson v. United States, 419 F.2d 695 (D.C.Cir. 1969); and United States v. $64,000 in United States Currency, 722 F.2d 239 (5th Cir. 1984) (both cases allude to the exclusionary rule as being a possible remedy). However, several state and federal courts have

developed a useful test for determining the exclusionary rule's propriety in the analogous situation of search warrants which are issued or executed in violation of Fed.R.Crim.P. 41 or its state counterpart. In United States v. Shelton, 742 F.Supp. 1491 (D.Wyo. 1990), the United States District Court for the District of Wyoming stated the rule as follows:

> "[V]iolations of Rule 41 alone should not lead to exclusion unless (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule."

742 F.Supp. at 1502-03 (quoting United States v. Burke, 571 F.2d 377, 386-87 (2d Cir. 1975). Although this test is phrased in terms of a search warrant, the same questions of "prejudice" and "intentional and deliberate disregard" are appropriate for deciding whether evidence obtained in violation of W.R.Cr.P. 4(c)(3) should be excluded.

To determine whether Appellant suffered

any prejudice in this case, we consider the officers' violation in light of the rights which W.R.Cr.P. 4(c)(3) was designed to protect. We discern two rights which the rule might be designed to protect.[2] First, it may prevent the unexplained detention of a lawfully arrested defendant. Bryson, 419 F.2d at 701. Appellant suffered no such bewilderment in this case. It was obvious from Appellant's statements throughout the arrest and booking procedure that he realized he was under arrest for shooting the victim. Second, the rule may be intended to safeguard a defendant's privilege against self-incrimination. Id. Appellant's description

---

[2]. The Bryson court suggested that the rule might also be designed to prevent unexplained arrests. 419 F.2d at 701. As noted in Bryson, this interpretation would require the police to inform a defendant of the reason for his arrest prior to the actual apprehension., We do not interpret the rule to require an officer to give such information prior to making an arrest. Roberts, 711 P.2d at 1136 n. 4; 800 P.2d 1145 (Rooney, J., specially concurring).

of the shooting was certainly an incriminating statement. However, we fail to see how the officers' failure to immediately inform him of the precise charge led to his prejudicial statement. Appellant knew that the charge concerned him shooting the victim. He could have been charged with a variety of different crimes for shooting the victim. It is highly unlikely that Appellant's decision to make an incriminating statement hinged upon the particular crime with which he was charged. In fact, the interviewing officer asked Appellant immediately after informing him of the second-degree murder charge whether having that knowledge changed anything in his statement. Appellant responded in the negative.

The second element of the test in Shelton asks whether the officers intentionally and deliberately violated the rule. Courts have interpreted this portion of the test as requiring bad-faith conduct by the officers.

State v. Fixel, 744 P.2d 1366 (Utah 1987); Commonwealth v. Mason, 597 Pa. 369, 490 A.2d 421 (1985). The arresting and detention officers in this case technically did not comply with the rule because they knew that an arrest warrant had been issued but failed to inform Appellant of its existence. Nothing in the record suggests that the officers deliberately violated the rule by not informing Appellant of the existence of the arrest warrant. The detention officer's testimony that Investigator Gaylord instructed him not to advise Appellant of the charge is of more concern. Investigator Gaylord denied giving such an instruction. Even if we assume that the detention officer was correct, it would appear that Investigator Gaylord meant only that he wanted to personally inform Appellant of the charge.[3] No evidence exists

---

[3]. Q. Were you instructed by anyone prior to the book-in, during the cook-in and before Mr. Murray exited with Officer Gaylord, were you instructed by anyone not to advise Mr. Murray what the charge was

to suggest that the officers were conspiring to keep Appellant from knowing what the charge was. The most troubling conduct is Investigator Smith's failure to inform Appellant of the charge until they were well into the interview. Investigator Smith explained that he just wanted to learn why and how the shooting occurred before informing Appellant of the charge. We certainly do not condone the investigator's failure to immediately inform Appellant of the charge, and we fully expect it not to happen again; however, the facts do not support a finding that he deliberately, and in bad faith, violated the rule.

SUFFICIENCY OF THE EVIDENCE

---

or what the arrest was for?

A. Yes, I was.

Q. Who was that by?

A. I do believe it was Officer Gaylord.

Q. And he asked that you not explain that there was a homicide, is that essentially it?

A. Correct. He said that he was going to do that.

[4] Appellant claims that the prosecution did not present sufficient evidence to sustain a conviction for involuntary manslaughter. He argues that, at most, the evidence supported a conviction for criminally negligent homicide. To review Appellant's sufficiency-of-the-evidence claim:

> "'[T]his court must determine whether, after viewing the evidence and appropriate inferences in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime to have been proven beyond a reasonable doubt.'" Jennings v. State, 806 P.2d 1299, 1302 (Wyo. 1991) (quoting Munson v. State, 770 P.2d 1093, 1095 (Wyo. 1989)).

Dreiman v. State, 825 P.2d 758, 760 (Wyo. 1992).

Our involuntary manslaughter statute §6-2-105(a)(ii), provides: "A person is guilty of manslaughter if he unlawfully kills any human being without malice, expressed or implied, . . . [i]involuntary, but recklessly." According to Wyo.Stat. §6-1-104(a)(ix) (1988) (emphasis added):

> A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation[.]

[5] The principal distinction between criminally negligent homicide[4] and involuntary manslaughter is whether the defendant

---

[4] Wyo.Stat. §6-2-107(a) (1988) provides:

> (a) Except under circumstances constituting a violation of W.S. 6-2-106 [homicide by vehicle], a person is guilty of criminally negligent homicide if he causes the death of another person by conduct amounting to criminal negligence.

Wyo.Stat. §6-1-104(a)(iii) (1988) provides in pertinent part:

> A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation[.]

consciously disregarded a substantial and unjustifiable risk or whether he failed, through criminal negligence, to perceive that risk. The Utah Supreme Court succinctly explained this distinction in State v. Howard, 597 P.2d 878, 881 (Utah 1979) (emphasis in original);

> The difference between the minimum required mens rea of recklessness for manslaughter and criminal negligence for negligent homicide is simply whether the defendant was aware, but consciously disregarded a substantial risk the result would happen, or was unaware but ought to have been aware of a substantial risk the result would happen.

Appellant testified in this case that he had served an extended tour of duty with the United States army in Vietnam, where he was a rifleman and a machine gunner. The army rated Appellant as being a sharp-shooter. Both the army and Appellant's father instructed him not to point a gun at anyone because someone could get hurt. His father also told him not to use guns when he had been drinking. Appellant admitted that, whenever someone discharges a

gun, it is a terribly dangerous activity. Appellant was also an avid hunter who hunted with a wide variety of guns. A reasonable jury could infer from Appellant's extensive experience with weapons that he was aware of but consciously disregard, the substantial and unjustifiable risk that the victim could be injured by a ricocheting bullet.[5]

---

[5] Appellant argues that People v. Post, 39 Ill.2d 101, 233 N.E.2d 565 (1968), mandates a contrary result. In Post, the defendant fired a single shot into the ground to scare off an intruder. The shot apparently ricochetted and killed the intruder. The Illinois Supreme Court held:

> The shooting of a .22 caliber pistol toward the ground is not per se reckless and is not such an act as would likely cause death or bodily harm to a person some distance away. Firing into the ground or into the air to frighten a marauder in order to keep him from returning is not, in our opinion, such a reckless act as to justify conviction of involuntary manslaughter.

233 N.E.2d 567. Obviously, several distinctions exist between Post and the present facts; e.g., Appellant fired several shots at the victim's

RESTITUTION AND CRIME VICTIM'S COMPENSATION ACCOUNT ASSESSMENT

[6] As part of Appellant's sentence, the district court ordered him to pay a $50 surcharge to the crime victim's compensation account; $10,000 in restitution to the crime victim's compensation account; $1,075.31 for the victim's funeral and ambulance expenses; and twenty percent of his future net income, as defined by Wyo.Stat. §20-6-301 (Supp. 1992), as child support for the victim's minor children.

Appellant complains that the Court violated Wyo.Stat. §7-9-103(a) (Supp. 1992) when it ordered him to pay for the victim's funeral expenses and twenty percent of his future net income as child support because the court did not find that he had an ability to pay. Section 7-9-103(a) provides:

---

feet, as opposed to firing a single warning shot; and the victim was a known friend as opposed to being a "marauder." We decline to follow Post to the extent, if any, our holding in the present case is inconsistent with the Post opinion.

> (a) The court shall require restitution by a defendant if it determines [or] finds that the defendant has or will have an ability to pay or that a reasonable probability exists that the defendant will have an ability to pay. If restitution is ordered, or at the time the defendant is placed on probation, the court shall fix a reasonable amount of restitution owed to each victim for actual pecuniary damage resulting from the defendant's criminal activity, and shall include its determination of the pecuniary damage as a special finding in the judgment of conviction or probation under W.S. 7-13-301. In determining the amount of restitution, the court shall consider and include as a special finding, each victim's reasonably foreseeable actual pecuniary damage that will result in the future as a result of the defendant's criminal activity. A long-term physical health care restitution order shall be entered as provided in W.S. 7-9-113 through 7-9-115.

In Shongutsie v. State, 827 P.2d 361 (Wyo. 1992), we interpreted the first sentence of §7-9-103(a) as requiring the judge to specifically find that a defendant has a present or prospective ability to pay prior to ordering restitution, 827 P.2d 369; see also Leach v. State, 836 P.2d 336 (Wyo. 1992). We

agree with Appellant that the trial court did not make such a finding in this case. Unfortunately, Shongutsie does not provide the quick and effective answer to the issue which Appellant anticipates.

Since deciding Shongutsie and Leach, we have become aware of an inconsistency between §7-9-103(a) and Wyo.Stat. §7-9-102 (Supp. 1992). Section 7-9-102 states:

> In addition to any other punishment prescribed by law the court shall, upon conviction for any misdemeanor or felony, order a defendant to pay restitution to each victim as determined under W.S. 7-9-103 and 7-9-114 unless the court specifically finds that the defendant has no ability to pay and that no reasonable probability exists that the defendant will have an ability to pay.

Pursuant to §7-9-102, the court is required to make a specific finding only when the defendant has no present or prospective ability to pay. If the defendant has or will have the ability to pay, the court must simply order restitution and does not need to make a specific finding. This contradicts the first

sentence of §7-9-103(a) which requires the court to order restitution "if it determines [or] finds" that the defendant has a present or prospective ability to pay. Section 7-9-103(a) indicates that finding an ability to pay is a condition precedent to ordering restitution.

Our overriding objective in construing these statutes is to ascertain and give effect to the legislature's intent. Parker Land and Cattle Company v. Wyoming Game and Fish Commission, 845 P.2d 1040 (Wyo. 1993). When two statutes, as here, are passed during the same legislative session and relate to the same subject matter, they are considered to be in pari materia. Wyoming State Treasurer v. City of Casper, 551 P.2d 687, 697 (Wyo. 1976). When statutes in pari materia are in apparent conflict, they should be construed in harmony with each other, if reasonably possible, so as to give force and effect to each. Id; City of Casper v. Joyce, 54 Wyo. 198, 88 P.2d 467

(1939).

We believe that §7-9-102 and §7-9-103(a) can both be given effect with some minor modification. Section 7-9-102 defines a court's duty regarding restitution. The court is required to order restitution in all cases unless the court specifically finds that the defendant has no present ability and no reasonably probable future ability to pay. Section 7-9-103(a) defines the process to be engaged in by the court to determine the amount owed. The only conflict is contained in 7-9-103(a)'s first sentence regarding when the court must make a specific finding that a defendant has an ability to pay. The first sentence is not necessary to the process of determining the amount owed. Both statutes can be harmonized and given effect by simply disregarding §7-9-103(a)'s first sentence. We are reluctant to ever construe any part of a statute as being surplusage; however, in this case it is the only way to give effect to both

statutes to the fullest extent possible.

We note that a second reason to disregard the first sentence of §7-8-103(a) is the ambiguity surrounding the language "determines [or] finds." The first sentence of 7-9-103(a) was amended twice during the 1991 legislative session. The Legislative Service Office inserted the word "or" to reconcile the different amendments. language inserted by the Legislative Service Office does not necessarily represent the Legislature's intent, and, consequently we are reluctant to rely upon it.

[7,8] Henceforth, the court must make a specific finding only when the defendant does not have a present or prospective ability to pay. Although the court is not required to specifically find that a defendant has the ability to pay, the record must still contain evidence to support the existence of a present or future ability to pay. In this case, Appellant had a relatively stable work

history. Appellant's brother-in-law testified at the sentencing hearing that Appellant could work for him in the air conditioning and refrigeration business. The judge could infer that Appellant had a prospective ability to pay.

[9] Appellant also argues that the district court's directive that he pay $10,000 to the crime victim's compensation account was improper because the court did not find that he had an ability to pay. Wyo.Stat. §1-40-119 (Supp.1992) states in pertinent part:

> (a) In addition to any fine or other penalty prescribed by law, a defendant who pleads guilty or nolo contendere to, or is convicted of, the following criminal offenses shall be assessed a surcharge of not less than fifty dollars ($50.00):
>
> . . . .
>
> (c) Under no circumstances shall a court fail to impose the surcharge required by subsections (a) and (b) of this section if the court determines the defendant has an ability to pay or that a reasonable probability exists that the defendant will have an ability to pay.

We agree with Appellant that the court was required to find that he had an ability to pay before ordering the assessment. Consequently, we set aside that part of the order requiring Appellant to pay $10,000 to the crime victim's compensation account.[6]

Affirmed as modified.

---

[6] The State argues that he $10,000 was restitution and should be dealt with pursuant to §7-9-103(a). We agree with Appellant that, although not denominated as such, this was an assessment under §1-40-119.

APPENDIX E.

OPINION DENYING APPLICATION FOR REHEARING

IN THE SUPREME COURT, STATE OF WYOMING

APRIL TERM, A.D. 1993

DONALD MURRAY,	)	
	)	
Appellant	)	
(Defendant)	)	
	)	
v.	)	No. 92-109
	)	
THE STATE OF WYOMING	)	FILE STAMPED
	)	JULY 23, 1993
Appellee	)	JERRILL CARTER,
(Plaintiff)	)	CLERK

ORDER DENYING APPLICATION FOR REHEARING

This matter came before the Court upon appellant's application for rehearing. The Court has fully considered that application and finds it should be denied. It is therefore,

ORDERED that the application for rehearing be, and hereby is, denied.

DATED this 20th day of July, 1993.

FOR THE COURT:

RICHARD J. MACY
Chief Justice

APPENDIX F.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS

UNITED STATES CONSTITUTIONAL PROVISIONS

1. AMENDMENT IV OF THE CONSTITUTION OF THE UNITED STATES:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. AMENDMENT V OF THE CONSTITUTION OF THE UNITED STATES:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. **AMENDMENT VI OF THE CONSTITUTION OF THE UNITED STATES:**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

4. **AMENDMENT XIV OF THE CONSTITUTION OF THE UNITED STATES:**

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULES PROVISIONS

RULE 4(d)(3), F.R.Cr.P.:

Rule 4: Arrest Warrant or Summons on Complaint.

* * *

(d): Execution or Service; and Return.

* * *

(3): Manner. The warrant shall be executed by arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as

possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and the fact that a warrant has been issued...

WYOMING STATUTES AND RULES INVOLVED

1. STATE STATUTES INVOLVED

Wyo. Stat. § 6-2-105 (1988) provides in pertinent part as follows:

> a) A person is guilty of manslaughter if he unlawfully kills any human being without malice, expressed or implied,...
>
> * * *
>
> (ii) Involuntarily, but recklessly except under circumstances constituting a violation of W.S. §6-2-106(b) [vehicular homicide].
>
> * * *
>
> (b) Manslaughter is a felony punishable by imprisonment in the penitentiary for not more than twenty (20) years.

* * *

In Wyo. Stat. 6-1-104(a)(ix) (1988), the term "recklessly" is defined as follows:

"Recklessly" is defined as the following conduct: A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

* * *

Wyo. Stat. 6-10-102 (1988) provides as follows:

Imposition of fine for any felony; maximum fine where not established by statute.

The court may impose a fine as part of the punishment for any felony. If the statute does not establish a maximum fine, the fine shall be not more than ten thousand dollars ($10,000.00).

* * *

Wyo. Stat. § 6-2-107 (1988) provides as follows:

(a) Except under circumstances constituting a violation of W.S. § 6-2-106 [vehicular homicide], a person is guilty of criminally negligent homicide if he causes the death of another person

by conduct amounting to criminal negligence.

(b) Criminally negligent homicide is a misdemeanor punishable by imprisonment for not more than one (1) year,, a fine of not more than two thousand dollars ($2,000.00), or both.

* * *

In Wyo. Stat. § 6-1-104(a)(iii) (1988), the term "criminal negligence" is defined as follows:

"Criminal negligence" is defined as the following conduct: A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

---

2. STATE REGULATIONS INVOLVED

Rule 4(c)(3), Wyoming Rules of Criminal Procedure provides as follows:

Rule 4. Warrant or summons upon information.

* * *

(c) Execution or service; return.

* * *

(3) Manner. - The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in the officer's possession at the time of the arrest, but shall provide a copy of the warrant to the defendant as soon as possible. If the officer does not have the warrant in the officer's possession at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued...

* * *

Rule 9(c)(3), W.R.Cr.P., provides as follows:

Rule 9. Warrant or summons upon information.

* * *

(c) Execution or service; return.

* * *

(3) Manner. - The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in possession at the time of the arrest, but shall provide a copy of the warrant to the defendant as soon as possible. If the officer does not have the warrant in possession at the time of the arrest, the officer shall then inform the

> defendant of the offense charged and of the fact that a warrant has been issued....
>
> * * *

Rule 5(h), Rules of the Supreme Court of Wyoming, provides as follows:

> Rule 5. Admission of attorneys to bar.
>
> * * *
>
> (h) Dates of Examination. - The State Board of Law Examiners shall annually conduct two (2) bar examinations, one (1) in February and the other in July, on dates to be determined by the board....

APPENDIX G.

ENTRY OF APPEARANCE

No. 93-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

DONALD MURRAY, JR.,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

ENTRY OF APPEARANCE

COMES NOW William L. Combs, Attorney-at-Law, duly admitted to practice before this Court, and, pursuant to Rule 19.3, Rules of the Supreme Court of the United States, hereby enters his appearance as counsel of record for Petitioner in the captioned matter.

RESPECTFULLY SUBMITTED this 9 day of November, 1993.

WILLIAM L. COMBS
724 Front Street, Suite 270
P.O. Box 785
Evanston, WY 82931-0785
(307) 789-7003